



**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R05-OAR-2009-0807; FRL-9905-69-Region 5]**

**Approval and Promulgation of Air Quality Implementation Plans;  
Ohio; Test Methods; Error Correction**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to determine that an October 26, 2010, action was in error and to make a correction pursuant to section 110(k)(6) of the Clean Air Act (CAA). The correction will bring the codification section of the October 26, 2010, action into accord with the actual substance of the rulemaking action. The October 26, 2010, final rule approved various revisions to Ohio regulations that consolidated air quality standards in a new chapter of rules and adjusted the rule cross references accordingly in various related Ohio rules, including a specific revision to the cross reference in the Ohio Administrative Code (OAC) pertaining to methods for measurements for comparison with the particulate matter air quality standards. The correction will remove the appearance that EPA approved extraneous portions of this rule in the OAC. EPA is not re-opening the comment period on the October 26, 2010, action.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R05-OAR-2009-0807, by one of the following methods:

1. [www.regulations.gov](http://www.regulations.gov): Follow the on-line instructions for submitting comments.
2. E-mail: [aburano.douglas@epa.gov](mailto:aburano.douglas@epa.gov).
3. Fax: (312) 692-2551.
4. Mail: Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. Hand Delivery: Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* Direct your comments to Docket ID No.

EPA-R05-OAR-2009-0807. EPA's policy is that all comments received will be included in the public docket without change

and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov) your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the SUPPLEMENTARY INFORMATION section of this document.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone John Summerhays, Environmental Scientist, at (312) 886-6067, before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** John Summerhays, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6067, [summerhays.john@epa.gov](mailto:summerhays.john@epa.gov).

**SUPPLEMENTARY INFORMATION:** This supplementary information section is arranged as follows:

- I. What Should I Consider as I Prepare My Comments for EPA?
- II. Background.
- III. What was the Error?

IV. What Action is EPA Taking?

V. Statutory and Executive Order Reviews.

**I. What Should I Consider as I Prepare My Comments for EPA?**

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
2. Follow directions - EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

**II. Background**

This proposed action is to correct an error in an earlier EPA rulemaking, using the authority of section 110(k)(6) of the CAA. Section 110(k)(6) provides EPA with explicit authority to correct errors in prior rulemaking actions:

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and the public.

EPA notes that this statutory provision provides EPA with authority to correct an error "whenever" EPA later determines that an error occurred. In addition, this provision does not define the term "error," and thus does not restrict EPA's authority merely to the correction of typographical mistakes or other such limited circumstances.<sup>1</sup> EPA has used this explicit statutory authority on multiple occasions to correct various

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<sup>1</sup> EPA notes that it is not necessary in this rulemaking to determine the precise contours of EPA's authority under section 110(k)(6), because the typographical error at issue in this action is clearly within that authority.

types of errors.<sup>2</sup>

The error at issue here occurred in an October 26, 2010, EPA rulemaking action pertaining to revisions to the SIP for the State of Ohio. On that date, EPA published both a proposal and a companion direct final rule, which addressed a SIP submission from the Ohio EPA dated September 10, 2009.<sup>3</sup> The state's September 10, 2009, SIP submission included a number of revisions submitted for EPA approval into the Ohio SIP, including amendments of some existing state rules, rescission and replacement of language in other existing state rules, and promulgation of a new state rule.<sup>4</sup> The state asserted that the overarching purpose for these various revisions was "to consolidate the state's ambient air quality standards" and explicitly stated that the intent was "to consolidate Ohio's [state regulations] into a single rule to provide greater

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<sup>2</sup> See, e.g., "Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas's Prevention of Significant Deterioration Program, 76 FR 25178 (May 3, 2011) (the error was full approval of a SIP submission with a legal deficiency); "Approval and Promulgation of Implementation Plans; Kentucky: Approval of Regions to the State Implementation Plan," 75 FR 2440 (Jan. 15, 2010) (the error was inclusion of provisions into the SIP); "Designation of Areas for Air Quality Planning Purposes; Correction of Designations of Nonclassified Ozone Nonattainment Areas; States of Maine and New Hampshire," 62 FR 14641 (March 27, 1997) (designations in error because insufficient information submitted).

<sup>3</sup> See "Approval and Promulgation of Air Quality Implementation Plans; Ohio; Ohio Ambient Air Quality Standards; Proposed rule," 75 FR 65594 (October 26, 2010); "Approval and Promulgation of Air Quality Implementation Plans; Ohio; Ohio Ambient Air Quality Standards, Direct final rule," 75 FR 65572 (October 26, 2010).

<sup>4</sup> See Letter from Chris Korleski, Director, Ohio EPA, to Bharat Mathur, Acting Regional Administrator, U.S. EPA Region V, dated September 10, 2009. A copy of this letter and the attachment is located in the rulemaking docket for this proposal.

accessibility for the regulated community and the citizens of Ohio.”<sup>5</sup>

Among the existing state regulations revised in the SIP submission was OAC 3745-17-03. The state gave no indication that it was revising OAC 3745-17-03 substantively or seeking EPA approval of any substantive revisions to that state regulation; the only revision identified by the state in the SIP submission was a revision to a cross reference in OAC 3745-17-03(A).

EPA’s October 26, 2010, action reflected EPA’s evaluation of the state’s SIP submission, and EPA’s approval of the various individual revisions requested by the state for the express purpose of consolidating the state’s regulations.

Unfortunately, in approving the state’s SIP submission, EPA erred by publishing a notice which did not properly reflect the precise rule revision submitted by the state in OAC 3745-17-03. Specifically, the state’s SIP submission requested that EPA approve a revision to OAC 3745-17-03, which the state itself reflected in “redline and strikeout” as merely one isolated change in OAC 3745-17-03(A), i.e., the deletion of an existing cross reference to rule “3745-17-02” and the insertion of a replacement cross reference to rule “3745-25-02.” The state did not redline any other revisions to OAC 3745-17-03 in the version of the regulation attached to the SIP submission. The state

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<sup>5</sup> Id. at page 1.



neither identified nor requested any other specific substantive revisions to the version of OAC 3745-17-03 currently approved by EPA as part of the SIP. Likewise, EPA did not identify or discuss any other revisions to OAC 3745-17-03 in the October 26, 2010, action.

However, EPA stated in the October 26, 2010, action that it "is approving the following Ohio Administrative Code rules: 3745-17-03 'Measurement methods and procedures'...." This statement was incorrect because it did not clearly describe the precise revision being approved by EPA and the erroneous omission of the citation to subsection "(A)" left the misimpression that EPA was approving more than the revised cross reference in OAC 3745-17-03(A). EPA also codified this change with an incorporation by reference described in the October 26, 2010, notice as "(A) Ohio Administrative Code Rule 3745-17-03 'Measurement methods and procedures', effective April 18, 2009." EPA should have explicitly limited that codification to OAC 3745-17-03(A). As evidenced by the lack of any evaluation or discussion of any substantive revisions to OAC 3745-17-03 whatsoever, and in light of the then pending proposed disapproval of certain substantive revisions to OAC 3745-17-03, it is evident that EPA did not intend, and could not have intended, to approve any revisions to OAC 3745-17-03 beyond the revised cross reference in OAC 3745-17-03(A).

EPA subsequently discovered the error in the October 26, 2010, rulemaking when EPA noticed the incorrect codification of OAC 3745-17-03 in the Ohio SIP in early 2013.<sup>6</sup> That incorrect codification wrongly suggested that EPA had approved revisions to OAC 3745-17-03 in toto, when it should have referred only to an approval of the revision to the cross reference in OAC 3745-17-03(A) as requested by Ohio. Accordingly, EPA published a final rule announcing the discovery of the error, explaining the error, and correcting the error, on April 3, 2013.<sup>7</sup> Within that April 3, 2013, action, EPA also explained its basis for concluding that notice and comment rulemaking was not necessary to correct the error in these specific circumstances and invoked the good cause exception to the requirement for notice and comment rulemaking under section 553 of the Administrative Procedure Act, 5 U.S.C. section 553(b)(B).

In response to EPA's April 3, 2013 notice, one party filed

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<sup>6</sup> This error was reflected in 40 CFR 52.1870(c)(151)(i)(A) which erroneously suggested that EPA had approved revisions to a version of OAC 3745-17-03 effective April 18, 2009, in its entirety, when this reference should have been limited to OAC 3745-17-03(A). This was an error as EPA did not and could not have approved the revision in toto in the October 26, 2010, action. EPA could only have approved the specific revision to the cross reference requested by the state and could not have approved other revisions not discussed or identified by the state in the SIP submission. In addition, EPA could not have approved any substantive revisions, regardless of whether the state requested them in the SIP submission, without adequate explanation of how such revisions would have been consistent with the requirements of section 110(l) and section 193. Moreover, this is especially the case as EPA has previously proposed disapproval of certain substantive changes in OAC 3745-17-03(B) for numerous reasons including noncompliance with those statutory provisions.

<sup>7</sup> See "Approval and Promulgation of Air Quality Implementation Plans; Ohio; Ohio Ambient Air Quality Standards; Correction, Final rule; correcting amendment," 78 FR 19990 (April 3, 2013).

a petition for reconsideration requesting that EPA reconsider its procedure in this matter and requesting that EPA instead proceed using the SIP error correction procedure of section 110(k)(6) of the CAA. The same party and other parties also filed petitions for review challenging the April 3, 2013 action, likewise reflecting their views that EPA should use the procedure of section 110(k)(6) to address the error in the October 26, 2010, rulemaking.

Although EPA believes that the Administrative Procedures Act authorizes action without notice and comment in circumstances such as those presented in this particular situation, EPA has nevertheless elected to correct the error in the October 26, 2010, action through a notice and comment procedure using the explicit authority of section 110(k)(6) in this action.<sup>8</sup> Based upon the apparent confusion caused by EPA's error as reflected in the petitions, EPA believes that proceeding pursuant to section 110(k)(6) at this time will provide interested parties an opportunity to provide comment and will better serve the intended purpose of eliminating any potential misunderstandings.

Except for this specific error identified in this proposed

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<sup>8</sup> EPA elected to grant a petition for reconsideration that specifically requested EPA to use section 110(k)(6) to correct the error. See Letter from Robert Kaplan, Regional Counsel, Region 5 to Cheri Budzynski dated August 27, 2013. A copy of this letter is located in the rulemaking docket for this proposal.

action under section 110(k)(6), EPA is not revising its action in the October 26, 2010, action. EPA is not aware of any other errors associated with that action.

### **III. What Was the Error?**

#### **A. What was the Error in Description and Codification?**

EPA's October 26, 2010, action was in error. In acting upon the September 10, 2009, SIP submission from the State of Ohio, EPA's notice of direct final rulemaking incorrectly indicated that the Agency was approving revisions to "OAC 3745-17-03" when the notice should have explicitly indicated that EPA was only approving the revised cross reference in OAC 3745-17-03(A). For the reasons discussed below, EPA did not approve more than the revision of the cross reference in OAC 3745-17-03(A) in the October 26, 2010, action, but EPA's notice inadvertently did not make that point clearly.

EPA's lack of precision in the preamble and in the codification in the October 26, 2010, action led to an incorrect codification in 40 CFR 52.1870, which erroneously could have suggested that EPA had approved substantive revisions to OAC 3745-17-03 in the Ohio SIP beyond the mere requested revision to the cross reference in OAC 3745-17-03(A).<sup>9</sup> EPA needs to correct

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<sup>9</sup> EPA notes that 40 CFR 52.1870(151)(i)(A) currently refers to an incorporation by reference of "Ohio Administrative Code Rule 3745-17-03(A) 'Measurement methods and procedures.', effective April 18, 2009." This incorporation by reference is thus now correct in the Code of Federal Regulations.

this codification error in order to assure that all parties, including regulators, regulated entities, and citizens are not confused by the error in the October 26, 2010, action.

EPA believes that this is precisely the type of scenario in which Congress has given EPA explicit authority to revise prior erroneous actions pursuant to section 110(k)(6). Accordingly, EPA is proposing to determine that its October 26, 2010, action was in error to the extent that it appeared to approve revisions to OAC 3745-17-03, beyond the mere approval of the revised cross reference in OAC 3745-17-03(A).

Even if EPA's mere failure to include the specific reference to subsection "(A)" of OAC 3745-17-03 in the October 26, 2010, action could have accidentally and unintentionally resulted in an approval of all of the other substantive changes in the version of OAC 3745-17-03 that the state failed to discuss or identify in the September 10, 2009, SIP submission, and that EPA failed to discuss or identify in its October 26, 2010, action, that would also have been in error as EPA cannot approve such substantive SIP revisions without proposing to do so, explaining the proposal, taking comment on the proposal, responding to comment on the proposal, and explaining the final approval. EPA could not have approved other substantive revisions claimed by some parties sub silentio.

#### **B. What Precipitated this Error?**

The error at issue resulted from a combination of causes, related to unintended ambiguities in both the state's SIP submission and EPA's October 26, 2010, action upon that SIP submission. The ambiguities in the September 10, 2009, SIP submission include: (i) the state's cover letter referred to the amendment of "OAC 3745-17-03" without highlighting that the actual requested amendment at issue was only in OAC 3745-17-03(A); (ii) the state's cover letter requested that EPA "accept the new and amended rules as replacements for the rules currently in our SIP" but without enumerating the specific revised subsections for such replacements; and (iii) although the state did include a redline/strikeout version to reflect the specific amendment in question, the state provided a redline/strikeout version against a version of OAC 3745-17-03 that was not the current version of OAC 3745-17-03 approved by EPA in the SIP.<sup>10</sup> The confusion injected by the state's use of a baseline version of OAC 3745-17-03 significantly different from the version that had been approved by EPA as part of the Ohio SIP, and failing to identify these differences, evidently led some parties to believe that EPA had approved substantive revisions to OAC 3745-17-03 beyond those actually approved by EPA, including certain provisions that EPA had expressly

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<sup>10</sup> A copy of the September 10, 2009, SIP submission is located in the docket for this proposal.

previously proposed to disapprove.

Notwithstanding any ambiguity in the state's SIP submission, however, EPA should have noted the ambiguities and should have been clearer in describing its own actions in the October 26, 2010, action. In acting upon the specific revision to OAC 3745-17-03 at issue in the September 10, 2009, SIP submission, EPA should have: (i) explicitly articulated that it was evaluating and approving only the revision to the replaced cross reference in OAC 3745-17-03(A) identified in the SIP submission by the state; (ii) correctly referred to and cited 3745-17-03(A) specifically in the notice and the codification, rather than OAC 3745-17-03 in general; (iii) should have noticed and addressed the fact that the version of OAC 3745-17-03 that the state used as the baseline from which it identified revisions was not the current approved version in the Ohio SIP; and (iv) should have noted the pending proposed disapproval of certain substantive revisions to OAC 3745-17-03 from another prior SIP submission. The confusion injected in part by EPA's failure to notice and address the significant unnoted substantive differences between the SIP version and the submitted version of OAC 3745-17-03 led some parties to take the position that EPA had approved substantive revisions to OAC 3745-17-03 beyond those actually approved by EPA.

**C. Why was it evident that this was an error?**

EPA believes that it should have been apparent that the October 26, 2010, action contained an error. First, although the state's September 10, 2009, SIP submission appeared to request that EPA approve "OAC 3745-17-03" in its entirety instead of being clear that only the cross reference in OAC 3745-17-03(A) was at issue, the attached redline/strikeout version of the rule included in the SIP submission highlighted only the replaced cross reference OAC 3745-17-03(A). The state identified no other revisions to OAC 3745-17-03, either in its description of the revision or in the redline/strikeout version of the regulation. Moreover, the "Rule Summary and Fiscal Analysis" submitted as part of the state's September 10, 2009, submission explicitly stated that the purpose of the state's own regulatory revision to OAC 3745-17-03 was "to update a citation to OAC rule 3745-17-02 in paragraph (A)."<sup>11</sup> The single minor redlined change highlighted in the SIP submission, in the context of the state's explicitly stated intent merely to consolidate OAC 3745-17-03 along with other rules, should have been a clear indication that the state did not consciously intend to make more substantive revisions to OAC 3745-17-03, nor that EPA consciously intended to approve any such substantive revisions, in the October 26, 2010, action.

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<sup>11</sup> See "Rule Summary and Fiscal Analysis (Part A)," dated April 8, 2009, 8:07 AM, submitted by the state in Article III, Attachment B, RSFAs, as an attachment to the September 10, 2009, SIP submission. A copy of the entire SIP submission is in the docket for this proposal.



Second, the version of OAC 3745-17-03 submitted by the state as part of the SIP submission did not reflect or identify revisions relative to the version of that rule that had actually been approved by EPA into the SIP. The version of OAC 3745-17-03 that had been approved by EPA into the Ohio SIP was the version effective in the state as of January 31, 1998, approved by EPA on October 16, 2007.<sup>12</sup> EPA has not approved a substantive revision to OAC 3745-17-03 (or any other revision beyond the referencing revision in paragraph A) since that time. The later version of OAC 3745-17-03 mistakenly used in the state's September 10, 2009, SIP submission as a baseline for identifying revisions has substantial differences from the version previously approved by EPA into the SIP. EPA's October 26, 2010, action did not include any discussion whatsoever of these differences between the version of OAC 3745-17-03 that had been approved by EPA in the Ohio SIP and the later version that the state used as a baseline in its September 10, 2009, SIP submission. Those differences are significant and substantive, e.g., the provisions that address compliance methods for opacity standards applicable to certain stationary sources, for which

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<sup>12</sup> See "Approval and Promulgation of Implementation Plans; Ohio Particulate Matter," 72 FR 58523 (Oct. 16, 2007). This 2007 action pertained to a SIP revision that the state submitted on July 18, 2000. This specific SIP submission preceded the revisions that the state submitted to EPA on June 4, 2003, that EPA has proposed to disapprove. The only revision to OAC 3745-17-03 that EPA has approved since 2007 is the revision to amend the cross reference in OAC 3745-17-03(A).

the unapproved revisions would allow significantly more opacity during certain periods. Such significant and substantive revisions to the existing approved version of OAC 3745-17-03, even if valid, would have required an analysis under section 110(1) and section 193, as appropriate, to support approval. The state's September 10, 2009, SIP submission contained no such analysis. EPA would have needed to provide an explanation of this analysis in the October 26, 2010, action or in the administrative record supporting that action. EPA provided no such analysis because it did not intend to approve those substantive changes to OAC 3745-17-03, merely the revision to the cross reference in OAC 3745-17-03(A). The absence of any such analysis should have been a clear indication that EPA was not approving any revisions to OAC 3745-17-03 beyond the cross reference.

Third, there is a pending rulemaking in which EPA proposed to *disapprove* certain substantive revisions to OAC 3745-17-03 contained in a June 4, 2003, SIP submission, during which EPA received comments both supporting and opposing the proposed disapproval.<sup>13</sup> The fact that EPA neither referred to that prior proposed disapproval action, nor responded to any of the comments that pertain to that prior proposed action in the

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<sup>13</sup> See "Approval and Disapproval of Ohio Implementation Plan for Particulate Matter; Proposed Rule," 70 FR 36901 (June 27, 2005). The June 4, 2003, SIP submission was not at issue in EPA's October 26, 2010, action, and is not at issue here.

October 26, 2010, notice, is further evidence that EPA did not and could not have approved any substantive revisions to OAC 3745-17-03 and could only have intended to approve the revisions to the cross reference in OAC 3745-17-03(A). Basic principles of administrative law, under both the CAA and the Administrative Procedures Act, require an agency to respond to significant adverse comments on a proposed action as part of notice and comment rulemaking, and it would have been improper for EPA to ignore the comments on the prior proposed disapproval of substantive revisions to OAC 3745-17-03. This absence of responses to comments on such significant substantive changes should have been a clear indication that EPA was in fact not intending to approve those revisions, and could only be approving the limited revision to the cross reference in OAC 3745-17-03(A), in the October 26, 2013, action.<sup>14</sup>

Given the foregoing facts, EPA believes that its October 26, 2010, action with respect to OAC 3745-17-03 was clearly in error. EPA could not have approved any revision, except with respect to the revision to the cross reference in OAC 3745-17-

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<sup>14</sup> EPA notes that commenters on the Agency's June 27, 2005, proposed disapproval of certain substantive revisions to OAC 3745-17-03 included the Ohio Chamber of Commerce, the Ohio EPA, and representatives of various industry groups. Accordingly, EPA presumes that some parties are familiar with that proposed disapproval and would have noted that none of the comments concerning the prior disapproval were addressed in the October 26, 2010, action, including their own. The substance of those comments is not germane to this action, but EPA includes those comment letters in the docket for this action solely for the purpose of illustrating that some parties would have been aware of the significance of the substantive revisions in OAC 3745-17-03 that EPA did not intend to approve on October 26, 2010.

03(A) specifically requested by the state in the SIP submission. Moreover, given the context, EPA believes that the error should have been evident at the time of the action. The foregoing facts form the basis for EPA's proposed determination that the October 26, 2010, action was in error.

#### **IV. What Action is EPA Taking?**

Pursuant to section 110(k)(6), EPA is proposing to determine that its October 26, 2010, rulemaking was in error to the extent that it appeared to approve revisions to OAC 3745-17-03 beyond the revision to the cross reference in OAC 3745-17-03(A). Through today's action, EPA is proposing to clarify that in the October 26, 2010, action, EPA did not approve any revisions to OAC 3745-17-03 except for the specific revision to the cross reference in OAC 3745-17-03(A) requested by the state. But for that change, the currently applicable version of OAC 3745-17-03 in the Ohio SIP is the version effective in the state on January 31, 1998, approved by EPA on October 16, 2007. The currently applicable version of OAC 3745-17-03 in the Ohio SIP does not contain any revisions addressed in EPA's proposed approval and disapproval on June 27, 2005.

On April 3, 2013, EPA used its authority under section 553 of the Administrative Procedures Act to amend the erroneous codification in its October 26, 2010, rulemaking without notice and comment rulemaking to reflect more clearly that EPA had only

approved the one isolated revision requested by the state in OAC 3745-17-03, i.e., the revision of the cross reference in OAC 3745-17-03(A). That corrected codification is already reflected in the CFR, i.e., the *status quo* is that the codification is correct. In response to a petition for reconsideration, EPA is proposing today to correct the misleading codification as an error pursuant to section 110(k)(6) rather than rely on the corrected codification identified in the April 3, 2013, final action.

EPA is soliciting comment on this proposed action under section 110(k)(6). By this means, EPA is taking proposed action to correct the erroneous codification of its October 26, 2010, rulemaking by clarifying that the only portion of Ohio's submittal on September 10, 2009, of OAC 3745-17-03 that should be codified as approved by EPA is OAC 3745-17-03(A). To reiterate, the only revision that EPA approved to OAC 3745-17-03 in the October 26, 2010, action is the revised cross reference in OAC 3745-17-03(A).

EPA believes that the facts set forth in this proposal demonstrate clearly that the October 26, 2010, action was in error to the extent that it appeared to approve revisions to OAC 3745-17-03 beyond the revision to the cross reference in OAC 3745-17-03(A). If EPA takes final action as proposed in this notice, EPA will also reaffirm the codification of OAC 3745-17-

03(A) in 40 CFR 52.1870 (c)(151)(i)(A). EPA is not reconsidering its October 26, 2010, action with respect to any other issues. EPA is also not in this rulemaking addressing the substance of provisions of OAC 3745-17-03 other than paragraph (A), which are outside the scope of the revision requested in the state's September 10, 2009, SIP submission and EPA's October 26, 2010, rulemaking. In particular, any substantive revisions to OAC 3745-17-03, including any revisions to OAC 3745-17-03(B)(1), are not at issue in this rulemaking. Only comments regarding EPA's correction of the error in the October 26, 2010, action are germane to this rulemaking under section 110(k)(6).

EPA notes that it is neither staying nor revoking the correction action in the April 3, 2013, notice, because that could be misleading to regulated entities, regulators, and members of the public alike. Because the error in the October 26, 2010, action was in essence a typographical error, and because there was no actual approval of any revisions to OAC 3745-17-03 other than the revised cross reference in OAC 3745-17-03(A), the previously approved version of the remainder of OAC 3745-17-03 remains in effect in the Ohio SIP. Based upon the still pending proposed disapproval of certain substantive revisions to OAC 3745-17-03, EPA believes that parties such as regulated entities affected by those substantive revisions would

be well aware of this fact, but not all other parties should be expected or presumed to have this degree of understanding or responsibility to be informed. While EPA is pursuing correcting action under authority of CAA section 110(k)(6), to supersede the correcting action under the Administrative Procedures Act, that EPA published on April 3, 2013, EPA anticipates that the codification as corrected pursuant to section 110(k)(6) will replicate the codification as corrected on April 3, 2013. Accordingly, EPA is not staying or revoking the correction in the April 3, 2013, action, in the interim during this rulemaking under section 110(k)(6). The April 3, 2013, action will become moot once EPA takes final action on today's proposal.

#### **V. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely corrects an error in EPA's prior action and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or



environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control,  
Incorporation by reference, Intergovernmental relations,  
Particulate matter, Reporting and recordkeeping requirements.

Dated: January 13, 2014

Susan Hedman,  
Regional Administrator, Region 5.

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